Supreme Court, U.S.
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No. 08-355

In The

Supreme Court of the United States

NANCY A. BURNS STRATTON,

Petitioner,

vs.

BOARD OF COUNTY COMMISSIONERS OF SARASOTA COUNTY,

Respondent.

On Petition For Writ Of Certiorari To The Florida Second District Court Of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Florida court's test for causation in takings cases, which requires that each governmental entity's action be viewed in isolation from the entity's other actions and those of other governmental entities, and effectively requires that each action be the exclusive cause of the taking, is out of step with decisions of this Court and other courts requiring only the proximate cause of the taking.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

CITATIONS TO OPINIONS BELOW 1

BASIS OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS 1

STATEMENT OF CASE AND PROCEEDINGS ... 2

REASONS FOR GRANTING THE WRIT 4

I. The Decision Below Conflicts With Decisions Of This Court And Others As To Causation In The Context Of Takings Where Multiple Governmental Actions Or Entities Are Involved 4

CONCLUSION 7

APPENDIX

Order on the Florida Second District Court of Appeal Filed April 25, 2008 ..... App.A

Order of the Circuit Court of the Twelfth Judicial Circuit in and for Sarasota County, Florida Filed August 11, 2006 ..... App.B

Order of the Florida Second District Court of Appeal Filed June 19, 2008 ..... App.C

Third Amended Complaint (without attachments) ..... App.D

TABLE OF AUTHORITIES

Page

CASES:

Connor v. Reinhard, 847 F.2d 384 (7th Cir. 1988) 5

Johnson v. Duffy, 588 F.2d 740 (9th Cir. 1978) 5

Neifert v. Department of Environment, 395 Md. 486, 910 A.2d 1100 (Md. 2006) 6

Parker v. District of Columbia, 850 F.2d 708 (D.C. Cir. 1988) 6

Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646 (1978) 6

Tahoe-Sierra Preservation Council, Inc. v. Tahoe, 216 F.3d 764 (9th Cir. 2000) 6

FEDERAL STATUTES:

28 U.S.C. § 1254 1

United States Constitution Amend. V 1, 3

United States Constitution Amend. XIV, Section 1 ..... 2, 3

CITATIONS TO OPINIONS BELOW

The decision of the Florida Second District Court of Appeal for which review is sought is reported at 983 So.2d 590 (Fla. 2nd DCA 2008) (Table) (App.A), and rehearing was denied on June 19, 2008. (App.C). That opinion affirmed, without opinion, the Florida circuit court's unreported final judgment (App.B).

BASIS OF JURISDICTION

Jurisdiction is based upon 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." United States Constitution, *Amend. V.*

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein

they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." United States Constitution, *Amend. XIV, Section 1.*

STATEMENT OF CASE AND PROCEEDINGS

In 2001, Stratton purchased a Gulf-front house that had been originally designed by a renowned architect associated with the Sarasota School of Architecture. The house, which was built in 1970, was known as the "Solomon House," for a world-renowned artist, Syd Solomon, and it was well known in Sarasota, particularly in its art community. The house consisted of a residence and an artist's studio, which were separated by an enclosed courtyard but connected by a 50' raised bridge. When Stratton purchased the house, it was subject to an existing condemnation order from the County as to the separate utility chase on the seaward structure (but not as to the main structural components of the residence) because the Gulf of Mexico was rapidly eroding the shoreline of the property. Stratton sought to have the house designated as a historic landmark, which would have allowed her to finish the steel pin-pile foundation system to the western foundation of the house installed by the previous owners and to protect her property with seawalls and berms without

running afoul of various County and FEMA regulations. In the absence of the historic landmark designation or certain variances, numerous regulations and code provisions prohibited Stratton from constructing shore protection and securing her home and protecting her work with a seawall. When she was denied historic designation status and then was denied a variance to allow her to erect a seawall, the house was damaged by the water, declared a public nuisance by the County, and was ultimately demolished in two phases by the County.

Stratton then filed suit seeking to establish Sarasota County's liability, *inter alia*, under the Fifth and Fourteenth Amendments for physical and regulatory takings of her property by delaying, and then denying, her historical designation status and variances that had been freely granted to others similarly situated that resulted in the past which would have allowed her to preserve and protect her home.

Florida Circuit Court: The trial court denied liability, concluding the board's denial of Stratton's petition for historic designation was not the proximate cause of her loss and therefore, her property was not "inordinately burdened" within the meaning of the Fifth and Fourteenth Amendments because there were other causes, *i.e.*, she would still need to obtain a variance and still go through the County's permitting process to make repairs necessary to save her home. (App.C, pp.1-2, 16-17).

Appellate Court: The Florida Second District Court of Appeal affirmed, without opinion, the Florida Circuit Court's unreported Final Judgment.

REASONS FOR GRANTING THE WRIT

The Florida court's test for causation in takings cases, which requires that each governmental entity's action be viewed in isolation from the entity's other actions and those of other governmental entities, and effectively requires that each action be the exclusive cause of the taking, is out of step with decisions of this Court and other courts requiring only the proximate cause of the taking.

I. The Decision Below Conflicts With Decisions Of This Court And Others As To Causation In The Context Of Takings Where Multiple Governmental Actions Or Entities Are Involved.

The Florida court's test for causation in takings cases, which requires that each governmental entity's action be viewed in isolation from the entity's other actions and those of other governmental entities, and effectively requires that each action be the exclusive cause of the taking, is out of step with decisions of this Court and other courts requiring only the proximate cause of the taking.

> In rejecting her takings claims, the trial court first noted that Stratton's case rests on the unusual interplay of at least four

> separate regulatory actions which were applied to her property over a period of time. Since Stratton has failed to cite any case where a court was faced with analyzing the interconnected, or cumulative, effect of multiple regulations applied separately over a period of time to a takings claim, this judgment will examine *each of the regulatory actions individually* as they relate to the various theories . . .

(App.C, pp.1-2) (emphasis added.)

By viewing these regulatory actions in isolation, the trial court applied the wrong test for causation in takings and other constitutional cases. In a case involving the relative apportionment of fault between public actors in a § 1983 case, the court in *Johnson v. Duffy*, 588 F.2d 740 (9th Cir. 1978), concluded that "[t]he requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Id.* at 743-44. *See also Conner v. Reinhard*, 847 F.2d 384, 396-97 (7th Cir. 1988) ("For liability under section 1983, direct participation by a defendant is not necessary. Any official who 'causes' a citizen to be deprived of her constitutional rights can also be held liable. The requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or should reasonably have known would cause others to deprive the plaintiff of her constitutional rights");

Parker v. District of Columbia, 850 F.2d 708 (D.C. Cir. 1988) (series of mistakes by police officers leading to serious injuries of innocent man).

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe*, 216 F.3d 764 (9th Cir. 2000), the Ninth Circuit came to a similar conclusion in a takings case, expressly invoking and applying a test for proximate causation less isolated and restrictive. There, the court held that "[i]t is well-established that foreseeability analysis is an appropriate part of proximate cause determinations in § 1983 actions." *Id.* at 784. The *Tahoe-Sierra* Court further noted that while it is "true that there is little discussion of a 'causation' requirement in any of the case law involving regulatory takings," despite a passing reference to proximate cause in *Penn Central* [*Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646 (1978)], "this is due to nothing more than the fact that, in most regulatory takings cases, there is no doubt whatsoever about whether the government's action was the cause of the alleged taking." *See also Neifert v. Department of Environment*, 395 Md. 486, 518, 910 A.2d 1100, 1119 (Md. 2006) (same).

Here, by denying Stratton historic designation that had been granted to all who had ever applied for it for all other properties, Sarasota County created the very nuisance it later claimed to abate, precluded her from getting the automatic exemption for historic designated properties which would have allowed her to exceed the $12,000 FEMA spending cap and defend her home from further erosion. The County's actions

as a cascading series of events created the Catch-22 that resulted in the County later, after lengthy delay, denying Stratton a seawall permit which it had regularly granted to her neighbors because her property had eroded too much because of the County's original denial and consequent limitation to the $12,000 FEMA spending cap.

CONCLUSION

For the reasons stated herein, petitioner requests that the writ of certiorari be granted.

Respectfully submitted,

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DATED: September 17, 2008

APPENDIX A
NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

NANCY A. BURNS STRATTON,
Appellant,
v.
BOARD OF COUNTY COMMISSIONERS OF SARASOTA COUNTY,
Appellee.

Case No. 2D06-4084

Opinion filed April 25, 2008.

Appeal from the Circuit Court for Sarasota County; Becky A. Titus, Judge.

Susan J. Silverman, Sarasota, and James K. Green of James K. Green, P.A., West Palm Beach, for Appellant.

Stephen E. DeMarsh, County Attorney, and Gary K. Oldehoff and David M. Pearce, Assistant County Attorneys, Sarasota, for Appellee.

PER CURIAM.

Affirmed.

SILBERMAN, CANADY, and VILLANTI, JJ., Concur.

APPENDIX B

IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR SARASOTA COUNTY

NANCY A. BURNS STRATTON,

Plaintiff,

v.

Case No.:
2004-CA-005921 NC

BOARD OF COUNTY COMMISSIONERS OF SARASOTA COUNTY, FLORIDA,

Defendant.

_____/

FINAL JUDGMENT

(Recorded Aug. 11, 2006)

This is an action on a third amended complaint alleging claims for inverse condemnation arising from violations of the United States and Florida Constitutions and a claim under Section 70.001, Florida Statutes. The plaintiff, Nancy A. Burns Stratton ("Stratton"), alleges that she is entitled to compensation and/or damages because the defendant, Board of County Commissioners of Sarasota County, Florida (the "Board"), through its regulatory and other police powers, caused the destruction of her home, the devaluation of her remaining land, and limited the use of her property in order to create public beach access. She has not proven her claims.

As a preliminary matter, the court observes that Stratton's case rests on an unusual interplay of at least four separate regulatory actions which were applied to her property over a period of time. Since Stratton has failed to cite any case where a court was faced with analyzing the interconnected, or cumulative, effect of multiple regulations applied separately over a period of time to a takings claim, this judgment will examine each of the regulatory actions individually as they relate to the various theories of recovery which Stratton has presented. In undertaking this examination, the court has elected not to give a detailed recitation of the facts, but instead will focus only on those facts which are central to the defeat of each of Stratton's claims.

Ripeness of Stratton's Uncompensated Regulatory Takings Claim

In 2001, Stratton applied to the Board for a variance from the coastal construction setback requirements of the Sarasota County Gulf Beach Setback Line (the "Setback Line") under Ordinance No. 2000-069 (the "Coastal Setback Code") to repair and reinforce the foundation of her home and build a bulkhead for protection from continuing erosion caused by the Gulf of Mexico. The Board rejected the application in Resolution No. 2001-182 (the "Resolution"). Stratton alleges that the Board's rejection effected a regulatory taking for which she is entitled to compensation under various legal theories. The Board argues that the variance request was not a

meaningful application, and that a final decision is needed with respect to how regulations concerning the Setback Line will be applied to Stratton's property before her uncompensated regulatory takings claim can be ripe.

A prerequisite to filing a challenge to a regulatory action is demonstrating that a regulatory authority has reached a final decision regarding the impact of the contested regulatory action on the property owner. *See Palazzolo v. Rhode Island, et al.*, 533 U.S. 606, 620 (2001). In *Palazzolo*, the United States Supreme Court explained: "[t]he central question in resolving the ripeness issue . . . is whether petitioner obtained a final decision from the Council determining the permitted use for the land." *Palazzolo* at 618. The United States Supreme Court further held that:

> "While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, *or the permissible uses of the property are known to a reasonable degree of certainty* a takings claim is likely to have ripened." *Id.* at 620 (emphasis added).

The Resolution offers specific guidance regarding the ways by which Stratton may use and improve her land. The Board's findings include:

> 1. The Gulf Shore area seaward of the Gulf Beach Setback Line is unstable and subject to rapid and severe fluctuations as well as

inundation from the storms in the Gulf of Mexico.

2. It is contrary to the public health, safety, and welfare to permit the construction of structures seaward of the Sarasota County Gulf Beach Setback Line except to the minimum extent necessary to permit reasonable use of the Petitioner's property.

* * *

5. The requested variance fails to meet all of the necessary variance approval criteria pursuant to the Coastal Setback Code.

6. Strict enforcement of the provisions of the Coastal Setback Code would not impose an unreasonable hardship on the land. Adequate land is available to relocate the proposed residential structure as much as 27 feet further landward on the property and on a new pile foundation, or in-line with other nearby development through the demolition and reconstruction of the structure further landward. Further, the Petitioner acquired full interest in the subject property on or about May 4, 2001, and is deemed to have constructive knowledge of the laws and restrictions affecting its use, including the Sarasota County Coastal Setback Code.

7. The requested variance is not a minimal variance request necessary to permit reasonable use of the property. The threatened status of the existing single-family residential structure could be entirely eliminated by

> relocating the residence or removing the seaward-most threatened structure.

These findings offer an indication as to the manner in which the Board would likely rule on any further variance request by Stratton because they specifically define the parameters by which Stratton's property may be used or improved. The Resolution's unequivocal language would greatly limit the Board's ability to approve any future variance application at odds with these findings. Therefore, since the Board's decision, as encapsulated in the Resolution, determines with reasonable certainty the permissible uses of Stratton's property, Stratton's claim is ripe for review by this court.

The Doctrine of Unconstitutional Conditions

At the time Stratton applied for a variance from the Setback Line, Board Staff had determined that the location of her home preempted lateral pedestrian access along the beach adjacent to the Gulf of Mexico. Stratton asserts that the Board exercised its regulatory power in denying her application in order to acquire a *de facto* interest in her property (public beach access) without payment of full and just compensation.

Nollan v. California Coastal Commission, 483 U.S. 825 (1987), is an illustrative case regarding the types of land-use permit conditions which do and do not constitute a taking requiring compensation. In *Nollan*, the prospective purchasers of a beachfront lot

sought a permit from the California Coastal Commission (the "Commission") to develop their property in accordance with a condition in their option to purchase. The Commission agreed to grant the permit on condition that the purchasers give the public an easement across the beachfront portion of their property. The purchasers contended that the imposition of the condition constituted a taking of private property without just compensation. The Commission countered that the condition served a legitimate public purpose. In reviewing these arguments, the United States Supreme Court concluded as follows:

> The Commission argues that among these permissible purposes [for requiring a permit] are protecting the public's ability to see the beach, assisting the public in overcoming the psychological barrier to using the beach created by a developed shorefront, and preventing congestion on the public beaches. We assume, without deciding, that this is so – in which case the Commission unquestionably would be able to deny the Nollans their permit outright if their new house . . . would substantially impede these purposes. *Nollan* at 835.[1]

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[1] The United States Supreme Court cautioned that no taking has occurred: " . . . unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking [under a *Penn Central* analysis]." For reasons developed in this judgment, Stratton has no claim under a *Penn Central* analysis.

Thus, *Nollan* makes it clear that, as a general proposition, the government may condition a land-use permit upon the conveyance of a property right if the permitted use would substantially impede a legitimate state interest. Applying this general proposition to the instant case, it becomes clear that the Board could constitutionally condition Stratton's permit on the grant of an easement over Stratton's property if the condition – in this case, the public beach easement – advances the governmental purpose for the prohibition – in this case, the application of the Setback Line. Among the public purposes of the Setback Line as articulated in Section 2(b) of the Coastal Setback Code is one which seeks to "[i]nsure public access along the public beaches of the Gulf of Mexico . . . " Since any condition requiring a public easement is reasonably related to the public need or burden that the proposed repairs and bulkhead would create, or to which they contribute in the area below the Setback Line, there is no taking under *Nollan*.

But this court need not consider the foregoing general proposition because the evidence presented to the Board at the variance hearing establishes that the denial of Stratton's application was not conditioned or grounded upon obtaining beach access. In fact, Stratton's plans included a 5-foot lateral pedestrian easement on top of the proposed bulkhead. Staff's presentation before the Board was primarily focused on how Stratton's application did not meet the requirements for a variance under the Coastal Setback Code. This detailed presentation

demonstrated the adverse environmental impact of Stratton's proposed bulkhead, the danger of increased erosion to adjacent properties, the inability of the bulkhead to protect the home from continuing wave impact, concerns regarding structural safety of the structure itself as opposed to the foundation, and alternatives which could address these conditions. *This evidence was virtually unrebutted by Stratton.* There was very little discussion concerning public beach access in general or even Stratton's proposed easement. Moreover, the Board's Resolution expressly states in paragraph 5 that "[t]he requested variance fails to meet all of the necessary variance approval criteria pursuant to the Coastal Setback Code." There is no reference to a denial of public access. Instead, the Resolution pointedly notes that Stratton had agreed to grant an easement for lateral pedestrian access.

To be sure, there are exhibits in the record pertaining to demands for public beach access which support Stratton's claim. However, these exhibits were communications to Stratton from Board Staff exchanged prior to the variance hearing. Although these exhibits offer proof that certain employees were motivated to recommend a denial of Stratton's application in order to obtain public beach access, the record does not establish that the Board's subsequent decision was similarly motivated. Given the evidence before the Board, it is clear that it was Stratton's failure to meet the criteria of the Coastal Setback Code, and not a desire to acquire public beach access,

which was the paramount factor in the Board's decision to deny her variance. Accordingly, Stratton has not established a taking under the doctrine of unconstitutional conditions as articulated in *Nollan*.

Categorical Taking by Regulation

Under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), Stratton must show a loss of all economical beneficial use of her property in order to receive compensation for a taking. The evidence does not establish that the application of the Coastal Setback Code deprived Stratton of "all economically beneficial use" of her property. The Board clearly left open the option to Stratton to relocate the property as much as 27 feet landward, which would still position the property in an area seaward of the Setback Line. Even if this option was unrealistic due to the cost and risk of moving the structure and problems associated with relocating a well and/or septic system, there is credible evidence that the application of the Coastal Setback Code to the parcel as a whole would not prevent Stratton from building a 3,330 to 4,050 square foot single family home on her current site.

Even if it is assumed that Stratton's property is unbuildable as a single family residence, her categorical *Lucas* claim and any claim under the arguably

more relaxed standard of *Joint Ventures v. Department of Transportation*, 563 So. 2d 622, (Fla. 1990)[2] fails because the application of the Coastal Setback Code was not the direct and proximate cause of her economic loss. If anything, Stratton's loss of use was a consequential loss because the application of the regulation did not directly cause the continued erosion of the property and the subsequent loss of use.

Categorical Taking by Physical Invasion

Stratton's home originally consisted of a landward structure and a seaward structure connected by an elevated walkway. After she was denied a variance to repair the foundation and construct a bulkhead, the evidence establishes that the seaward structure continued to deteriorate, became unsafe, and was eventually demolished by Sarasota County through its regulations concerning unsafe structures. Sometime thereafter, the landward structure suffered the same fate. Stratton did not follow through on any legal action originally taken to thwart the demolitions and concedes for purposes of this action that both buildings were unsafe. She nevertheless claims that the demolitions constituted physical invasions or occupations of her property and constituted takings under *Loretto v. Teleprompter Manhattan CATV Corp*,

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[2] Under *Joint Venturer*, the standard is " . . . any substantial interference with private property which destroys or lessons its value . . . " *Joint Ventures* at 624 n.6.

458 U.S. 419 (1982), and *Storer Cable T.V., Inc. v. Summerwinds Apartments Associates, Ltd.*, 493 So. 2d 417 (Fla. 1986).

The state may enter onto land to abate a public nuisance. *See State Plant Bd. v. Smith*, 110 So. 2d 401 (Fla. 1959). No compensable taking has occurred if public harm is being prevented, as opposed to achieving public benefit. *See Department of Agriculture and Consumer Services v. Mid-Florida Growers*, 521 So. 2d 101 (Fla. 1988). Clearly, the removal of an unstable structure eliminates a public hazard to beachgoers, thereby preventing a public harm. Furthermore, certain limitations inhere in a landowner's title itself, such as the state's power to abate nuisances or otherwise forestall grave threats to the lives and property of others. For example, the state is not liable for destruction of property when the state is acting to limit the spread of fire. *See Lucas* at 1029 n. 16. As such, Stratton is not entitled to compensation for physical invasion or occupation.

Ad Hoc Penn Central Analysis

Stratton claims that the Board's regulatory action so drastically interfered with the use of her property as to constitute a regulatory taking under the ad hoc analysis of *Penn Central Transportation Company et al. v. City of New York et al.*, 438 U.S. 104 (1978). An ad hoc *Penn Central* analysis traditionally involves consideration of three factors: (1) the character of governmental action; (2) the extent to which the

regulation interferes with investment-backed expectations; and (3) the economic impact of the regulation. *Penn Central* at 124.

(1) Character of governmental action

An examination of the character of governmental action involves: " . . . the type, extent, and effect of the government's regulations on the plaintiff's property . . . The plaintiff must show that the government action went beyond the type of government land-use regulation that is a cost all citizens must pay for living in an organized society." *Bowles v. United States*, 23 Cl. Ct. 443, 446 (Cl. Ct. 1991). Courts employ a balancing test weighing the interest of the plaintiff against the government's need to protect the public. *See Bass Enterprises Production Co. v. United States*, 54 Fed. Cl. 400, 403 (Fed. Cl. 2002). The application of the Coastal Setback Code to Stratton's property produced no disproportionate burden on Stratton. Stratton's property was uniquely compromised due to its proximity to the Gulf of Mexico. As a consequence, the Gulf waters steadily eroded the foundation of the property. Therefore, it is only reasonable to expect an amplified effect of the application of the Coastal Setback Code to Stratton's property.

(2) Reasonable investment-backed expectations

An investment-backed expectation is properly analyzed under a reasonableness standard. *See Forest*

Properties, Inc. v. United States, 39 Fed. Cl. 56, 76 (Fed. Cl. 1997). For reasons described below, Stratton's investment-backed expectations concerning the value of her property were manifestly unreasonable.

The Sarasota County regulations at issue in the instant case were enacted prior to Stratton's purchase of the property, which weighs heavily against Stratton's claims:

> A regulatory scheme affecting the property at issue at the time of purchase can significantly discount an owner's investment-backed expectations with respect to the property. In fact, numerous courts have found that a regulatory structure can thoroughly abrogate a property owner's investment-backed expectations . . . The rationale underlying these decisions is two-fold. First, to hold otherwise would turn the Government into an involuntary guarantor of the property owner's gamble that be could develop the land as be wished despite the existing regulatory structure. Second, it is assumed that when a property owner purchases property that is subject to regulations which may proscribe, or limit certain uses of the property 'the owner presumably paid a discounted price for the property'. *Forest Properties* at 76-77 (quoting *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994)).

Stratton purchased the property at issue in this case from J. Gordon and Phyllis Rubin (the "Rubins")

on May 4, 2001. In addition to her implied knowledge of the regulations at issue, Stratton had actual knowledge of all of the following facts and events at the time she made her investment:

(a) Stratton became aware that the property was for sale sometime in the year 2000. She was given a "Seller's Property Disclosure Statement" which noted that there was "erosion from Gulf of Mexico", "recurrent high water into courtyard" and that the home's privacy walls and lower level breezeway were or had been damaged. This document also disclosed that erosion had occurred at the foundation which was corrected by the installation of steel pins or rods driven into the bedrock.

(b) Stratton subsequently learned of a recorded deed restriction which stated, in part, the following:

> Due to the extremely close proximity to the mean high water line, the permittee agrees to remove the dwelling structure and its foundation from the property upon notification from the Department of Environmental Protection staff that one or more of the seawardmost pilings of the dwelling have become situated seaward of the mean high water line and that the moving of said mean high water line occurred in a manner such that by the laws of the State of Florida, the State would have gained title to said land.

The deed restriction further included provisions delineating a method for determining the mean high

water line, providing for enforcement by the Department of Environmental Protection ("DEP") and declaring that the restrictions " . . . shall not be altered without the express prior written consent of the Department or its successors in interest."

(c) At trial, Stratton testified that she was also aware of a "Notice To Proceed" issued by the DEP an June 21, 1999 which granted a permit to the Rubins to do certain repairs to the foundation system of the dwelling. A caveat to the permit states that "(b)ased on current conditions on the property, the permittee is hereby notified that the department staff will not recommend approval of any future request for the construction of a coastal or shore protection structure on the subject property for the protection of the dwelling structure."

(d) Stratton was aware that Sarasota County had served the property owners, the Rubins, with notice that the building was an unsafe or unfit structure (the "Notice of Unfit"). This document lists six conditions which the County deemed violations of the Sarasota County Code governing unsafe buildings and structures. It directed the Rubins to correct the unsafe conditions by either obtaining a demolition permit and demolishing the structure, or by obtaining a building permit to make the necessary repairs. It also contained the following provision: "Please note that repairs which add to, or modify, the existing residential foundation may require a coastal setback variance pursuant to Section 54-723(d)(1), Article XXII. Please consult with Rob LaDue of Resource

Protection Services at (941) 378-6113 for further information in this regard."

(e) Stratton's contract with the Rubins, which was executed in November 2000, was contingent " . . . upon County and State approval to relocate the building closer to the water forward (easterly) directly behind front structure. Also, contingent upon the approval to install a rock revetment and fill to provide protection to the remainder of said property." The contract provided that these contingencies would expire after thirty days. This time period was later extended through amendment of the contract in December, 2000.

(f) After entering into the contract to purchase, Stratton hired engineer Brian Stirling to address the unsafe conditions listed in the Notice of Unfit. Stirling's plan for repair included the installation of a rigid coastal wall to protect the property. In January, 2001, Board Staff notified Stratton's attorney by letter that, while the structural repair designed by Stirling "seems appropriate", "we disagree with your proposal to leave the existing structure in its present location. This structure should be relocated landward." Staff also objected to the proposed location of the coastal wall "given the need for public beach access" and indicated that the wall should be relocated landward. In addition, Staff noted that the structure must be elevated in order to comply with floodplain management regulations. The exhibits in the record clearly demonstrate that at no time did Board Staff (who reviewed Stirling's plans) ever

retreat from their position that the location of the structure and the coastal wall did not meet the variance requirements of the Coastal Setback Code due to the impact on the active beach and/or interference with pedestrian beach access. At no time did any Board employee give Stratton any assurance that the Board would approve her variance application and Stratton never submitted a different plan to Staff for review.

(g) Stratton began the process of obtaining an exemption from the elevation requirements through designation of the home as an historic structure, a process which she knew would eventually require approval from the Board. Just prior to the meeting of the Historic Preservation Board on March 29, 2001, Sarasota County issued a notice of condemnation due to the deteriorating condition of the seaward structure.

Despite Stratton's knowledge of all of the above, she decided to close on her contract with the Rubins and took title on May 4, 2001. She argues that she relied on the assurances of Kristina Tignor and that this reliance gave her a reasonable expectation that her variance application would be granted.

Stratton engaged Tignor, an engineer, to help her obtain the variance for the bulkhead. Tignor identified other properties that had received permits for bulkheads or seawalls in the vicinity of Stratton's property and advised Stratton that she believed her bulkhead would be permitted. Tignor also consulted

with Steve Lewis, a Tampa attorney with knowledge of the DEP, who wrote a letter to Tignor saying he had discussed the situation with DEP who said they thought it would get DEP approval. But at trial, Tignor testified that she was "not familiar at all" with the Rubins' application for a wooden frangible seawall, which the Rubins later withdrew (T. at 380). It is unclear the extent to which Tignor was fully informed as to the caveats on the Rubins' permit. When Stratton was asked by her attorney to explain why she thought the DEP's position would be any different in 2001 given the caveat attached to the DEP permit for the Rubins' 1999 repair, she testified: "I believe I discussed this with – with I think it might have been Kristy, but things had changed in the area. We had a seawall right down the street . . . because of the conditions that had changed in the area I just felt like – I think that they would look at conditions as they were." (T. at 574-75).

Stratton's subjective feelings regarding the likelihood of being able to construct a bulkhead do not provide an objectively reasonable basis upon which to make an investment in the property. Indeed, "prior permissive conduct by Government in administering regulations does not affect investment-backed expectations because Government could enforce regulations in more stringent fashion if it so chose." *Forest Products* at 78-79 (citing *Golden Pacific Bancorp v. U.S.*, 15 F. 3d 1066, 1075 (Fed. Cir. 1994)). Stratton was on notice of the many hurdles she faced in obtaining a variance from the Board to build a

bulkhead. Nonetheless, she gambled that the Board would grant her a variance. Stratton's investment-backed expectations were objectively unreasonable.

(3) The economic impact of the regulation

A regulation's economic impact is not wholly gauged by examining the economic impact on one property owner versus another property owner. "Legislation designed to promote the general welfare commonly burdens some more than others . . . Similarly, zoning laws often affect some property owners more severely than others but have not been held to be invalid on that account." *Penn Central* at 133-34. Due to the precarious position of Stratton's home, it is only logical that she stood to lose more economic value than her neighbors might lose through regulation. Furthermore, Stratton did not lose all economic value in her property. For example, the Board's Resolution made clear that they would entertain a proposal that would move a residence further landward on the property. To support a takings claim, one must suffer " . . . the reduction in value in the parcel as a whole." *Forest Properties* at 80. While the Board's application of the Coastal Setback Code may have prevented Stratton from the use of some of her property, the property is buildable and can support a single-family home. The lot remains a valuable asset to Stratton.

Upon review of all of the foregoing considerations, Stratton's claims fail under every prong of an ad hoc *Penn Central* analysis.

The Harris Act

Section 70.001, Florida Statutes, known as the Harris Act, requires a showing that: "a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use cereal property, . . . ". Stratton's Harris Act claim is based on the Board's denial of Stratton's application for historic designation status for her property and its refusal to allow her to speak at a hearing on the application in December, 2001. Stratton's argument concerning the Board's refusal to let her speak is a due process test, and is therefore not properly part of a takings analysis. The court, therefore, will not factor this argument into its analysis.

Section 70.001(3)(e) of the Harris Act defines the terms "inordinate burden" or "inordinately burdened" in part as follows:

> The terms "inordinate burden" or "inordinately burdened" mean that an action of one or more governmental entitles has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that

> the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large . . .

Applying this definition to Stratton's Harris Act claim, it is readily apparent that the Board's denial of Stratton's historic preservation application was not the direct and proximate cause of the loss of her house and the limited use of her property. Even if the historic designation status had been granted, Stratton still would have had to successfully go through the permitting process in order to make repairs to her home and get approval for a bulkhead, as well as defeat Sarasota County's condemnation order. At best, the denial of the historic designation application limited her ability to perform certain repairs to the property.

Moreover, at the time Stratton's historic designation request and variance request were denied, her existing use of the property was already a limited use because of the ongoing deteriorating condition of the property caused by its proximity to the Gulf of Mexico waters. Therefore, the denial of Stratton's historic status request in no way limited Stratton's existing use of her property. Rather, the Board's denial only resulted in a continuation of her then-existing use of the property.

Stratton also argues she had a vested right to use her property as a single-family residence. Even before

Stratton applied for an historic designation, her property had a questionable residential use. The seaward structure had already been condemned, and the landward structure only had a limited residential use. Even assuming the right to use the property as a single-family residence is a vested right, the denial of the historic designation imposed no direct limitation on Stratton's use of her property, as discussed above.

The Board's action placed no inordinate burden upon Stratton. The state of Stratton's property was unique. The property was already situated precariously close to the Gulf waters at the time Stratton submitted her request for historic designation and had been condemned as an unsafe structure. In reviewing the criteria for historic designation and denying the application, the Board focused on the structure's lack of "integrity" based on concerns regarding its location and damaged condition. Stratton's assumption that the Board would grant permission to build the bulkhead in addition to granting historic designation status to a condemned structure was not an objectively reasonable expectation upon which to base her investment in the property. In the face of numerous concerns about the property's viability, Stratton nevertheless purchased the property. Having assumed the risk that her various applications would be granted, it is she who must bear the burden of any resulting loss.

It is, therefore,

ADJUDGED that plaintiff, **NANCY A. BURNS STRATTON,** take nothing by this action and that

defendant, **BOARD OF COUNTY COMMISSIONERS OF SARASOTA COUNTY, FLORIDA,** shall go hence without day. Jurisdiction is reserved to award costs.

DONE AND ORDERED in chambers, in Sarasota, Sarasota County, Florida this 11th day of August, 2006.

/s/ Becky A. Titus
BECKY A. TITUS
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. Mail as follows on this 11 day of August, 2006.

S.W. Moore, Esq.
Jackson H. Bowman, Esq.
BRIGHAM MOORE, LLP
3772E Fruitville Road
Sarasota, Florida 34237

Stephen E. DeMarsh, Esq.
Gary K. Oldehoff, Esq.
Office of the County Attorney
1660 Ringling Blvd.,
Second Floor
Sarasota, Florida 34236

/s/ Karen Yost
Karen Yost
Judicial Assistant

APPENDIX C
IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327,
LAKELAND, FL 33802-0327

June 19, 2008

CASE NO.: 2D06-4084
L.T. No.:
2004-CA005921-NC

Nancy A. Burns Stratton	v.	Board Of County Commissioners Of Sarasota
Appellant/Petitioner(s),		Appellee/Respondent(s).

BY ORDER OF THE COURT:

Appellant's "motion for rehearing motion for rehearing en banc and motion for certification of question" is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Susan J. Silverman, Esq. James K. Green, Esq. David M. Pearce, Esq. Karen Rushing, Clerk

me

/s/ James Birkhold [SEAL]
James Birkhold
Clerk

APPENDIX D
IN THE CIRCUIT COURT OF
THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

NANCY A. BURNS STRATTON

Plaintiff,

v.

BOARD OF COUNTY COMMISSIONERS OF SARASOTA COUNTY, FLORIDA,

Defendant. /

CASE NO. 2004-CA-005921-NC

THIRD AMENDED COMPLAINT
(Proposed)

Plaintiff, Ms. Nancy Burns Stratton, (hereinafter "Ms. Stratton") sues Defendant, Board of County Commissioners of Sarasota County (hereinafter "County" or "Commission") for conduct which has violated the Plaintiff's constitutional rights and has resulted in the deprivation and/or loss to the Plaintiff of her property use and property value. Plaintiff, Ms. Stratton, files this Complaint seeking relief based upon the following allegations:

1. This is an action for inverse condemnation under Article X, Section 6 of the Florida Constitution, for violation of Plaintiff's constitutional rights guaranteed by Article I, Section 2, and for compensation under the Bert J. Harris Jr., Private Property Rights

Protection Act, Section 70.001, Florida Statutes, and for violation of the 5th and 14th Amendments to the United States Constitution.

2. The jurisdiction of this Court is invoked pursuant to Article V, §§ 5 and 20, Florida Constitution (1968); § 26.012, Florida Statutes (2003) and § 70.001, Florida Statutes (2003). Plaintiff seeks damages for violations of her state civil rights and for the taking of her property rights protected by the Florida and United States Constitutions.

3. Plaintiff seeks compensation and/or damages in excess of $15,000.00 exclusive of fees, costs, or interest for a deprivation of statutorily and constitutionally protected property rights.

4. Defendant resides in Sarasota County, and all the claims arose in Sarasota County. The real property subject of this action is located in Sarasota County.

GENERAL ALLEGATIONS

5. Plaintiff, Ms. Stratton, is a resident of the State of Florida, and is the owner of real property located on Siesta Key along the Gulf of Mexico in Sarasota County. The street address of the property is 9210 Blind Pass Road. The subject property is legally described in Exhibit A, attached hereto and incorporated herein by reference.

6. The Defendant, the Board of County Commissioners of Sarasota County, is a Political Subdivision of the State of Florida, which may sue and be sued; and which has local jurisdiction over the development and permitted uses of the subject property. Whenever any action is alleged in this Complaint on the part of Defendant, these allegations include any actions carried out by the County's agents and employees, and those actions were done within the scope of authority, agency, or employment by the County.

7. No further adequate administrative remedy is available that was designed to provide a means of relief for the violations of Plaintiff's constitutionally-protected rights.

FACTUAL ALLEGATIONS

8. Plaintiff acquired the subject real property (commonly known as, and hereinafter referred to as the "Solomon House") from J. Gordon and Phyliss Rubin on May 4, 2001 in the name of Plaintiff's corporation, SPE #8. Warranty Deed attached hereto as Exhibit B, and incorporated herein by reference. Plaintiff, Ms. Stratton, later transferred the property from her corporation to herself on April 3, 2003. Subsequent to this transfer, Ms. Stratton married, changing her name from Ms. Nancy Burns to Ms. Nancy Stratton. Ms. Stratton remains the current and sole owner of the Solomon House. Warranty Deed attached hereto as Exhibit C, and incorporated herein by reference.

9. The Solomon House is located immediately south of Turtle Beach on Siesta Key. It, as well as three other homes on Blind Pass Road, are waterfront property directly facing the Gulf of Mexico. Over time, the adjacent beach has eroded and the sand has dissipated, encroaching into the property line, leaving the Solomon House exposed and vulnerable to the natural forces of water and wind.

10. At the time of Plaintiff's purchase of the subject property in May, 2001, the Historic Preservation Board for Sarasota County ("Board") had approved the recommendation of the Solomon House for historic designation. The Solomon House was deemed a significant historical structure because (1) the original owner, Syd Solomon, is an internationally recognized artist and key member of the Sarasota Art Colony; and (2) the house embodied the distinctive characteristics of the Sarasota School of Architecture, and it was associated with master Sarasota architect, Gene Leedy. See Exhibit D, Rubin Historical Designation Recommendation Memo, attached hereto and incorporated herein by reference. However, as of the date of Ms. Stratton's purchase, the historic preservation issue had not yet been heard by the County Commission, which makes the final determination of historic designation pursuant to Sarasota County Code Ordin. (Fla.) § 66-115 (1997). The previous owners, Mr. and Mrs. Rubin, were also under a *Condemnation Order and Notice of Intent to Demolish* issued by the County Building Official on March 26, 2001. See Exhibit E, attached hereto and incorporated herein

by reference. The two issues: historic designation and demolition, were clearly fundamentally and simultaneously contradictory.

11. Upon purchasing the property, Plaintiff made numerous meaningful, yet futile, attempts to attain the necessary permission from the County to repair her home's foundation from the effects of the aforementioned erosion and to prevent the demolition of the Solomon House. Plaintiff retained an attorney to appeal the *Condemnation Order* to the County Board of Adjustments and Appeals, and eventually to the Sarasota County Circuit Court. While the historic designation and demolition matters were pending, Plaintiff applied for a variance to the Coastal Setback Code, Sarasota County Code Ordin. (Fla.) § 54-721 et seq., (2000) to allow the necessary repairs required to avoid demolition. Plaintiff's request for historic designation, if granted, would allow her to repair the home without having to comply with onerous Federal Emergency Management Administration ("FEMA") requirements.

The Request for Variance from Coastal Setback Code

12. Plaintiff applied to the Commission for a variance from the Coastal Setback Code on May 21, 2001. See Exhibit F, Pl.'s Coastal Setback Variance Application, attached hereto and incorporated herein by reference. In her application, Plaintiff proposed to

complete the installation of a foundation underpinning system that had been partially completed by the previous owners pursuant to an Emergency Variance granted by the Commission on June 10, 1999. Exhibit G, Resolution No. 99-149, attached hereto and incorporated herein by reference. Plaintiff farther proposed to construct a vertical retaining wall which would serve to protect the new foundation system from wash-outs. Exhibit F.

13. Plaintiff's application for the variance was accompanied by all the requisite documents, including, but not limited to, topographic and special purpose surveys and construction plans. See Exhibit F.

14. All other similarly situated landowners in the immediate area who applied for variances had been granted a similar variance.

15. Defendant, County, denied Plaintiff's variance application after a hearing on July 25, 2001. Resolution No. 2001-182 is attached hereto as Exhibit H, and is incorporated herein by reference.

16. Without the variance from the County, the Plaintiff was unable to obtain the necessary permitting from the Florida State Department of Environmental Protection, and the planned construction became impossible.

17. The delay in construction resulted in continued erosion, and the seaward section of the Solomon House began to crumble into the Gulf of Mexico. Ocean waters were able to reach the interior of the

home, and conditions continued to worsen. Denied the right to repair the home in time, Plaintiff was compelled to agree to the demolition of the seaward structure in compliance with the previously issued Condemnation Order and Notice of Intent to Demolish. See Exhibit E. This acquiescence was a result of the Plaintiff's mounting costs in the face of continued frustration. The seaward structure of the Solomon House was demolished on or about March 20, 2003, and the County assessed a lien against the home for $129,315.23, its cost of demolition. Exhibit I, Rec. of Lien, attached hereto and incorporated herein by reference.

17(a). On June 18, 2004, Plaintiff filed her Complaint against Sarasota County "for conduct which has violated the Plaintiff's constitutional rights and has resulted in the deprivation and/or loss to the Plaintiff of her property use and property value." During the initial stages of this circuit court action, Defendant notified Ms. Burns Stratton that her landward structure had been deemed unsafe and "is condemned." Please see Exhibit I(1), "Emergency Condemnation Order and Notice of Intent to Demolish, dated September 23, 2004.

17(b). Thus Plaintiff's last remaining residential structure was ordered condemned and subject to demolition within 4 days, September 27, 2004. Ms. Burns Stratton objected to the Order and Notice of Intent by letter dated September 24, 2004, attached hereto as Exhibit I(2). Another "Emergency Condemnation Order and Notice of Intent to Demolish" was

sent by Defendant to Plaintiff on September 30, 2004, a Exhibit I(3) attached. This document essentially tracks the Notice of September 23, 2004, but sets a later date for demolition, October 6, 2004. Plaintiff's counsel notified the County Code Enforcement officer on October 5, 2004 that an independent engineer, Brian Stirling, had inspected the landward structure and had determined that, contrary to the County's findings, the structure did not pose an "imminent threat of collapse," and that the "primary structural frame" was *not* compromised. . . ." Said report was delivered to the County's officer. Please see memorandum of Brian Stirling, dated October 5, 2004, Exhibit I(4), attached.

17(c). Notwithstanding this report, the County proceeded with its efforts to demolish Plaintiff's last remaining structure. Please see Exhibit I(5), letter from Jim LeGay, Code Enforcement officer to Plaintiff's counsel, dated October 8, 2004 and the proposed "agreement" attached thereto. By letter of October 11, 2004, Plaintiff's counsel, on behalf of Ms. Burns Stratton, rejected the County's proposed agreement and asked for additional time and more reasonable demolition terms. Attached hereto as Exhibit I(6). Plaintiff's pleas were to no avail, and her last remaining residential structure was demolished by a county agent in October 2004. Plaintiff was assessed the cost of the demolition in the amount of $91,072.86. Please see Exhibit I(7).

The Application for Historic Designation

18. While working through the County's Coastal Setback Variance process, the Plaintiff also made a request to the County that the Solomon House be considered for Historic Designation.

19. The application for Historic Designation was significant to the success of Plaintiff's proposed construction. The FEMA 50% Rule requires a property owner to construct the home to current flood standards if more than 50% of its market value is spent on restoration. If Plaintiff could have obtained Historic Designation, she would have been exempt from those FEMA requirements and would have had the opportunity to repair the home.

20. The previous owners of the Solomon House, Mr. and Mrs. Rubin, applied for historic designation on March 6, 2001. When Plaintiff acquired the property, the Rubins withdrew their request and Plaintiff submitted her own. On both owners' applications, the Historic Preservation Board recommended historic designation for the Solomon House to the Commission. Exhibit D and Exhibit J, Burns Historical Designation Recommendation Memo dated June 27, 2001, attached hereto and incorporated herein by reference.

21. The Defendant Commission was set to hear the historic designation request on July 10, 2001, but continued the item until it could consider the Coastal Setback Variance Petition. Composite Exhibit K, Emails Amongst County Officials, attached hereto

and incorporated herein by reference. Such hearings are deemed quasi-judicial in character.

22. The historic designation request was once again noticed to be heard in front of the Commission on October 9, 2001. The notice, dated October 2, 2001, is attached as Exhibit L, attached hereto and incorporated herein by reference.

23. The County, however, again postponed the October 9, 2001 hearing and the Defendant did not finally hear the request for Historic Designation until December 11, 2001. During the December 11th hearing, County Administrator Jim Ley stated that the multiple continuations of the hearing were a result of the Commission waiting for a decision from the Building Code Board of Adjustments and Appeals on the Condemnation Order. Exhibit M, Transcr. Sarasota Bd. of County Commrs. Meeting 2:22-3:2 (Dec.11, 2001), attached hereto and incorporated herein by reference.

24. Ms. Muldowney, the county staff member presenting the decision of the Historic Preservation Board, outlined the law on Historic Designation and demonstrated how the Solomon House qualified under the legal standards. She further recommended to the Commission that the Solomon House be granted Historic Designation.

25. Mr. Ley, County Administrator, testified to the various coinciding procedures that Plaintiff had pursued to prevent the demolition of the Solomon House, such as the appeal of the *Demolition Order* to

the Building Code Board of Adjustments and Appeals and the application for a coastal setback variance. Exhibit M, Transcr. 13:21-14:15.

26. The Defendant County then denied the application for Historic Designation. See Exhibit M.

COUNT I, INVERSE CONDEMNATION BY PHYSICAL APPROPRIATION

27. Plaintiff realleges Paragraphs 5 through 26 above, and asserts that the Defendant's actions as described therein, directly resulted in a physical invasion and permanent destruction of Plaintiff's property.

28. Defendant's actions have substantially ousted the Plaintiff from her property, as well as deprived her of the use and enjoyment thereof. She has lost all quiet enjoyment and reasonable economic utility of her property.

29. As a result of the Defendant's intentional conduct, Plaintiff is unable to enjoy, develop, refinance, or market her property. The County's actions have denied her of any feasible means to do so.

30. The Plaintiff's injuries are unique and not suffered by either the public at large or even other owners adjacent to the Plaintiff, and are, in effect, the result of a physical invasion of her property proximately caused by the Defendant's actions.

31. Plaintiff has performed all preconditions prior to the bringing of this action required by law, including obtaining a final decision from the County regarding the application for historic designation and the variance request. Any further attempts by Plaintiff to obtain the designation or variance would be futile in light of the demolition of the home's seaward portion and the Commission's obvious determination to prevent any restoration of the Solomon House.

32. Plaintiff's property and surrounding properties have, since initial construction, enjoyed seawater protection. By no longer allowing man-made flood controls, the Defendant has effectuated erosion in the area, resulting in catastrophic flooding, and thereby destroying all reasonably economic use of the property by Plaintiff.

33. This flooding is expected to reoccur continually in the future, as the County has not permitted a preventative barrier or armoring structure to halt the erosion and, subsequently, the destructive flooding.

34. The Defendant's actions and changes in policy regarding artificial water controls have denied Plaintiff of any means of maintaining the Solomon House, preventing the destructive flooding, or restoring it to a habitable condition. Defendant's actions in causing the demolition of both residential structures have resulted in the complete destruction of her improvements on the subject site. By its actions as alleged above, Defendant has physically taken the Plaintiff's property without paying full compensation

in violation of Article I, Section 2 and Article X, Section 6, of the Florida Constitution, and Amendments 5th and 14th of the United States Constitution.

WHEREFORE, Plaintiff respectfully asks this Court to enter an Order of Taking of the subject property, to establish the date of taking, and to empanel a jury of twelve persons to decide the issue of full compensation for that taking; as well as enter an Order taxing all reasonable fees, costs, and interest against the Defendant; and to grant any other relief deemed necessary by this Court to protect fully the constitutional rights of this landowner.

COUNT V. FOR UNCOMPENSATED REGULATORY TAKING IN VIOLATION OF FLORIDA CONSTITUTION

35. Plaintiff realleges and incorporates herein by reference the allegations in Paragraphs 5 through 26 of this Complaint, as if fully set forth herein.

36. Article X, Section 6 of the Florida Constitution provides that no private property shall be taken for a public purpose without full compensation paid to the owner thereof. The United States Constitution, Amendment 5, provides that no private property shall be taken without just compensation.

37. The actions of the County have denied the landowner any reasonable, economically viable use of her property and have deprived Plaintiff of her

reasonable investment-backed expectations for the use of her property. The County's longtime policy of allowing artificial water control along Gulf front properties halted abruptly when Plaintiff's property was endangered. See Exhibit M, Transcr., 26:21-25, 27:1-12, 27:22-25, and 28:1-4. Defendant's denial of Plaintiff's request for a variance and/or its denial of Defendant's application for historical preservation description, and/or the issuance of Defendant's Emergency Condemnation and Notices of Intent to Demolish, Exhibits I(1) and I(3), attached, directly resulted in a complete destruction of Plaintiff's improved and unimproved property without full compensation provided therefor.

38. The actions of the County have interfered with Plaintiff's reasonable expectations regarding the ownership, possession, use, value, and enjoyment of her property to the extent that both reasonable economic use and reasonable economic value of the property has been substantially destroyed.

39. Plaintiff has thus been deprived of her property rights by the County without full and just compensation, in direct violation of the guarantees of Article X, Section 6 of the Florida Constitution and Amendments 5th and 14th of the United States Constitution.

40. Plaintiff has performed all preconditions prior to the bringing of this action required by law, including obtaining a final decision from the County regarding the application for historic designation and

the variance request. Any further attempts by Plaintiff to obtain the designation or variance would be futile in light of the demolition of the home's seaward portion and the Commission's obvious determination to prevent any restoration of the Solomon House.

41. Any additional attempts by Plaintiff to reapply for building permits, historic designation, or a coastal setback variance, would be not only extremely costly, but also futile in light of the previous unreasonable denials by the Defendant County.

WHEREFORE, Plaintiff respectfully asks this Court to enter an Order of Taking of the subject property, to establish the date of taking, and to empanel a jury of twelve persons to decide the issue of full compensation for that taking; as well as enter an Order taxing all reasonable fees, costs, and interest against the Defendants; and to grant any other relief deemed necessary by this Court to protect fully the constitutional rights of this landowner.

COUNT VI, FOR COMPENSATION UNDER THE BERT J. HARRIS, JR., PRIVATE PROPERTY RIGHTS PROTECTION ACT

42. Plaintiff realleges and incorporates herein by reference the allegations in Paragraphs 5 through 26 of this Complaint as if fully set forth herein.

43. The Bert J. Harris, Jr., Private Property Rights Protection Act, (hereinafter, the "Property Rights Protection Act") Section 70.001, Florida

Statutes, provides that a landowner is entitled to compensation for the loss in fair market value from an inordinate burden to the landowner's **existing use** or vested right to a specific use, of the real property where such loss in fairness should be borne by the public at large. The Property Rights Protection Act further defines an "inordinate burden" as occurring when:

> "an action of one or more governmental entities has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large . . . " FSA 70.001 (3)(e).

44. Prior to the demolition of the Solomon House, Plaintiff had an existing use and vested right to use her property as a residence. Use of her property as a residence was a reasonably foreseeable and non-speculative use, as the subject property had previously supported a residence for more than thirty years, and the surrounding improved properties are also residential. Further, at the time Plaintiff purchased the home, an unanimous decision by the

Historic Preservation Board to designate her home as an historic site had already been rendered. See Exhibit D. The Preservation Board found the property "has retained its integrity of location, materials, workmanship and association." Exhibit D. The reasons for the Historic Preservation Board's unanimous decision were based on the requirements provided by Chapter 66 of the Sarasota County Code of Ordinances and included the following characteristics of the home:

A. **Association with the lives of persons significant in local, state, or national history (Sara. County Code Section 66-74(1)(b)).**

> "The Syd Solomon House and Studio are significant on the local level for their association with the original owner, Syd Solomon. Solomon is an internationally known abstract artist who also played a significant role in the establishment of Sarasota as a center for the arts during the 1940's and 1950's. He has also been recognized as an active, important, and well-known member of what became known as the Sarasota Art Colony which existed during that period of time."
>
> Exhibit D.

B. **Embody the distinctive characteristics of a type, period, or method of construction; or represent the work of a master builder, architect, or designer; or possess high artistic value; or represent a**

significant and distinguishable entity whose components may lack individual distinction. (Sara. County Code, Section 66-114(b)(3)).

"The Syd Solomon House and Studio embody the distinctive characteristic of the Modem architectural movement as interpreted by the architects associated with the Sarasota School of Architecture. It is also significant for its association with master architect, Gene Leedy, a prominent member of the original group of architects who established the Sarasota School of Architecture movement in Sarasota after World War II."

Exhibit D.

45. Defendant's action of denying Ms. Stratton's application for historic designation has inordinately burdened the existing use in that such decision directly thwarted Plaintiff's attempts to maintain her property by actively preventing any construction that would serve to save the home. This loss is permanent, as the Solomon House has now been demolished by County agents.

46. Plaintiff sought the historic designation in order to allow the expenditure of funds that would be required to repair, restore, and protect the home on her property. If granted historic designation, Plaintiff would comply with the exception to the Federal Emergency Management Administration ("FEMA") rule, which, if applicable, would prevent Plaintiff

entirely from protecting the property and its structure. FEMA limits the amount of money that can be spent on a structure over a certain amount of time. See Composite Exhibit T, 44 CFR 9.5 at (d)(4)(i) (2005) (limiting expenditures), 42 U.S.C. 5172 (2005) (guidelines for repairing damaged facilities/ structures), and 44 CFR 9.4 at definition of "Substantial Improvement" (2005) ("The term 'substantial improvement' does not include any alteration of a structure or facility listed on the National Register of Historic Places or a State Inventory of Historic Places"). The required repairs could not be effectuated without the historic designation. As the Defendant County knew or should have known, relief from this FEMA rule would provide Plaintiff with the means to protect her property. Conversely, denial of the application rendered Plaintiff's property defenseless against erosion, as any and all means of protection had been halted by the Defendant County.

47. The Defendant, by denying Plaintiff's application for historic designation, directly contributed to Plaintiff's permanent loss of property. By means of the denial, the Defendant caused the inordinate burden – the permanent loss of the Solomon House.

48. Therefore, while Plaintiff had no particular right to be **granted** historic designation, based on the facts as alleged, she had a reasonable expectation of a probable outcome based on the law. The action of the Defendant in denying of Plaintiff's application, led directly to the inordinate burden on her property.

49. The Board of County Commissioners is a "governmental entity" as defined in the Bert J. Harris, Jr., Private Property Rights Act, Section 70.001 (3)(c), Florida Statutes.

50. Plaintiff has complied with all conditions precedent to filing this action, including, but not limited to:

A. Presenting a claim to the County not less than 180 days prior to filing this action. See Exhibit R, Pl.'s Notice to County, attached hereto and incorporated herein by reference;

B. Receiving a reply from the County pursuant to Florida Statutes, 70.001(4)(c) within the 180 day notice period. See Exhibit S, Def.'s Response, attached hereto and incorporated herein by reference; and

C. Receiving a final decision of allowable uses pursuant to Florida Statutes, 70.001(5)(a) from the County. See Exhibit S.

51. As a direct and proximate result of the County's actions in denying Plaintiff's application for historic designation and adopting Resolution 2001-306, the subject property has been inordinately burdened by the County, resulting in a loss of fair market value of the real property to which Plaintiff is entitled to compensation under the Bert J. Harris, Jr., Private Property Rights Protection Act, Section 70.001, Florida Statutes.

WHEREFORE, Plaintiff requests judgment that the Defendant County's actions as alleged entitle Plaintiff to compensation under the Bert J. Harris Jr., Private Property Rights Protection Act, Section 70.001, Florida Statutes, including an award of costs, reasonable attorneys' fees, and such other relief as this Court deems appropriate.

DEMAND FOR JURY TRIAL

52. Plaintiff hereby demands a jury trial pursuant to Rule 1.430 of the Florida Rules of Civil Procedure for all issues so triable, including, but not limited to, the issues of its Complaint filed against the Defendant.

/s/ SW Moore
S. W. Moore, Esquire
Florida Bar No. 0157268
Jennifer Aycock Bonifield, Esquire
Florida Bar No. 0602086
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished to Gary K. Oldehoff, Esquire, OFFICE OF THE COUNTY ATTORNEY, 1660 Ringling Blvd., Second Floor, Sarasota, Florida 34236 by facsimile at 2:30 a.m./p.m. and U. S. Mail on February 1, 2006.

/s/ SW Moore
S. W. Moore, Esquire
Florida Bar No. 0157268
Jennifer A. Bonifield, Esquire
Florida Bar No.: 0602086
BRIGHAM MOORE, LLP
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No. 08-355

Supreme Court, U.S.
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In The
Supreme Court of the United States

NANCY A. BURNS STRATTON,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS
OF SARASOTA COUNTY, FLORIDA,

Respondent.

On Petition For Writ Of Certiorari To The Florida Second District Court Of Appeal

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner has presented a compelling reason for certiorari review based on a Florida trial court's statement admonishing Petitioner for failure to cite any case requiring analysis of the interconnected, or cumulative, effect of multiple regulations applied separately over a period of time to a takings claim, rather than each regulatory action individually as they relate to Petitioner's various theories of recovery.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

CITATIONS TO OPINIONS BELOW 1

BASIS OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 20

I. Stratton has not demonstrated a compelling reason why the writ should be issued ... 20

II. Stratton's petition does not identify when the federal question was raised with the state appellate court 22

III. The trial court's proximate cause analysis is consistent with that used by other courts 24

IV. Stratton's petition contains several misstatements of fact that bear on the issue of proximate cause if certiorari were granted 25

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Banks v. Ogden, 69 U.S. 57 (1864).....25

Board of Directors of Rotary Intern. v. Rotary Club of Duarte, 481 U.S. 537 (1987).....23

Cardinale v. Louisiana, 394 U.S. 437 (1969).....23

Forest Properties, Inc. v. United States, 39 Fed. Cl. 56 (Fed. Cl. 1997).....18

Key Haven Assoc. Enter., Inc. v. Board of Trustees, 427 So.2d 153 (Fla. 1983).....14

Klein v. United States, 375 F.2d 825 (Ct. Cl. 1967).....24

Omnia Commercial Co. v. United States, 261 U.S. 502 (1923).....24

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).....17, 18, 19

Rains v. Washington Dept. of Fisheries, 575 P.2d 1057 (Wash. 1978).....25

Souza v. Silver Development Co., 210 Cal.App.3d 165 (Cal. Ct. App. 1985).....24, 25

Stratton v. Board of County Commissioners of Sarasota County, Florida, 983 So.2d 590 (Fla. 2d DCA 2008).....1

Tahoe-Sierra Preservation Council, Inc. v. Tahoe, 216 F.3d 764 (9th Cir. 2000).....21

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONS

FLA. CONST., art. X, § 11 2

U.S. CONST., amend. V. 1, 22

U.S. CONST., amend. XIV, § 1 ..... 1, 22

STATUTES

16 U.S.C. Ch. 33 (1990) 2

28 U.S.C. § 1254 (1988) 1

42 U.S.C. § 1983 21

Chapter 161, Part III, Florida Statutes (2008) 2

RULES AND REGULATIONS

Supreme Court Rule 10 ..... 20, 21, 22

Supreme Court Rule 14 22

44 C.F.R. § 60.5 (1984) 2

OTHER AUTHORITIES

Fla. Admin. Code Ch. 62B-33 3

Section 54-724(a) of the Code of Ordinances of Sarasota County, Florida 3, 8, 28

BLACK'S LAW DICTIONARY 646 (8th ed. 2004) 22

Bert J. Harris, Jr., Private Property Rights Protection Act, §§ 70.01 et seq., Florida Statutes 14, 15, 19, 23

CITATIONS TO OPINIONS BELOW

The decision of the Second District Court of Appeal of Florida for which review is sought is reported as *Stratton v. Board of County Commissioners of Sarasota County, Florida*, 983 So.2d 590 (Fla. 2d DCA 2008) (Table). Rehearing was denied on June 19, 2008. That opinion affirmed, without written opinion, the final judgment of the Twelfth Judicial Circuit Court for Sarasota County, Florida.

BASIS FOR JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254 (1988).

CONSTITUTIONAL PROVISIONS

U.S. CONST., amend. V.

U.S. CONST., amend. XIV, § 1.

STATEMENT OF THE CASE

This case involves a dispute between Nancy A. Burns Stratton ("Stratton") and the Board of County Commissioners for Sarasota County, Florida ("the Board" or "the County"). Stratton claims that the Board inversely condemned her beachfront property.

In the early 1970's, artist Sydney Solomon commissioned the construction of a beachfront house for his property located at 9210 Blind Pass Road, Sarasota, Florida. R. 2097-98, 4400-03. Blind Pass Road runs parallel to the Gulf of Mexico near the southern tip of Siesta Key. R. 2097-98, 4400-03. After construction, the Solomon house consisted of two three-story structures oriented tandem and perpendicular to the shoreline. R. 1547, 1557. A courtyard occupied the space between the two structures at ground level. R. 2097, 3085. A foot bridge connected the second story of each structure. R. 2097, 3085. The seaward structure included the living quarters and fronted the Gulf of Mexico. R. 2097, 3085. The landward structure included an artist's studio and fronted Blind Pass Road. R. 2097, 3085.

At the time the house was constructed, approximately 250 to 300 feet of beach separated its seaward portion from the Gulf. R. 4919-20. A significant portion of the beach eroded during the 1970's and 1980's. R. 1520-37. Without question, this beachfront property is and has been subject to a highly regulated environment consisting of constitutional provisions regarding the public trust in shoreline property, state and federal statutes and regulations, and local ordinances. Tr. 1264-74; *see also* Article X, Section 11, Florida Constitution; 16 U.S.C. Chapter 33 (1990) (Coastal Zone Management Act of 1972, as amended); 44 C.F.R. § 60.5 (1984) (FEMA regulations for flood and erosion prone areas, as amended); Chapter 161, Part III, Florida Statutes (2008) (coastal zone protection);

Fla. Admin. Code Chapter 62B-33 (rules and procedures for coastal construction seaward of the coastal construction control line and fifty-foot setback); Chapter 54, Article XXI, of the Code of Ordinances of Sarasota County, Florida (Coastal Setback Code, f/k/a Gulf Beach and Barrier Island Setback Code).

In the early 1990's, Sydney Solomon and his wife sold the subject property to J. Gordon Rubin and Phyllis Rubin. Tr. 831, 956; R. 3103, 3138-39, 3142-43. During the time the Rubins owned the property, the shoreline continued to erode and eventually damaged the seaward portion of the house. R. 1520-37.

In 1999, the Rubins made several repairs to the seaward structure, and used steel pins to stabilize its foundation. R. 8501-03, 8622-23. The State of Florida Department of Environmental Protection ("DEP" or "the Department") granted permission to repair the foundation and superstructure. Tr. 688-89; R. 8348-8352. However, the Department added as a caveat to its permit that Department staff "would not recommend approval of any future request for the construction of a coastal or shore protection structure on the property for the protection of the dwelling structure." Tr. 688-89; R. 8348-8352. The total cost of the repairs, combined with other prior repairs within the five years prior, was slightly less than 50% of the total value of the home. R. 2276, 3018.

In September 2000, an engineer again found erosion damage to the seaward portion of the residence.

Tr. 506, 1529; R. 5569-71, 8505, 8610-21, 8624-25. The engineer informed the Rubins about the dangerous conditions on the property, and urged them to move the seaward structure further landward. R. 5570-71, 8624-25. The engineer also reported the dangerous conditions to Sarasota County. R. 5569-71, 8553.

In October 2000, the County issued a warning to the Rubins that the seaward structure was unsafe, and that they had to take corrective measures. Tr. 464-65, 506; R. 5567-68. The County issued the warning because the scour effect of tidal surge was causing sand to erode from under the pad footing and slab system, exposing the pin piles underlying the seaward structure. Tr. 513, 1531; R. 5567-68. Because the pin piles were exposed to the elements, the seaward structure was in danger of dropping, cracking, and further settling as a result of the void created by the erosion of sand underneath the pad footing and slab. Tr. 513, 1531-32, 1538.

On November 13, 2000, the Rubins and Nancy Burns Stratton ("Stratton") entered into a contract for sale of the property for $800,000. R. 3088-93. Stratton received a "Seller's Property Disclosure Statement" which noted that there was "recurrent high water into courtyard" and that the home's privacy walls and lower level breezeway were or had been damaged. R. 3101-03. The disclosure statement also disclosed that erosion had occurred at the foundation, and that corrective action included the installation of steel pins driven into the bedrock. R. 3101-03.

Stratton subsequently learned of a recorded deed restriction for the property which stated, in part, the following:

> Due to the extremely close proximity to the mean high water line, the permittee agrees to remove the dwelling structure and its foundation from the property upon notification from the Department of Environmental Protection staff that one or more of the seaward most pilings of the dwelling have become situated seaward of the mean high water line and that the moving of said mean high water line occurred in a manner such that by the laws of the State of Florida, the State would have gained title to said land.

R. 8463-67, 8492.

Stratton's contract with the Rubins included contingencies for county and state approval to relocate the seaward structure, and installation of a rock revetment. R. 8484-88. When the time came to cancel the contract under the above contingency, on December 14, 2000, Stratton waived the original contingency and replaced it with a new contingency clause:

> This Contract and Buyer's obligations under it are conditioned upon Buyer receiving written conceptual approval by the State of Florida and the County of Sarasota regarding the relocation and repair of the existing structure, and construction of an appropriate shore protection structure (wall) and further conditioned upon the satisfactory resolution of the Notice of Unfit or Unsafe Structures

> and Order to Correct Issued by Sarasota County on October 30, 2000. This contingency must be fulfilled or waived by Buyer within 45 days following the full execution of this Amendment. If the contingency is not fulfilled or waived by Buyer within 45 days, then the Contract shall be terminated, the parties relieved of further obligations under it, and Buyer's earnest money deposits shall be returned to Buyer.

R. 8493. Stratton could have terminated the contract and received her earnest money under this clause by as late as February 21, 2001. R. 8454, 8494. After this date, she could have walked away from the deal, losing only her earnest money $25,100. R. 8458. Stratton nevertheless waived these conditions and went forward with the purchase of the property. R. 8494.

On March 26, 2001, the County issued a condemnation order alerting the Rubins that the County planned to demolish the seaward structure. Tr. 125; R. 2101-02, 4349-50, 5608-09. Contrary to Stratton's contention otherwise in her petition, the condemnation order did not solely concern the demolition of a utility chase. R. 2101-02, 4349-50, 5608-09. Rather, the condemnation order states, "In accordance with Sarasota County Code Section 22-34(3), the seaward portion of the residential structure located at 9210 Blind Pass Road is condemned." R. 2101-02, 4349-50, 5608-09. The County recorded the condemnation order in the official records of the clerk of the circuit

court, and copied Stratton with the condemnation order. R. 2101-02, 4349-50, 5608-09.

On May 4, 2001, Stratton closed on the property. Pet. App. D, p.29. Stratton wanted to leave the seaward structure at its location in the surf and sought historic designation for the home. R. 2183-86. Historic designation would have given Stratton an exemption to a cumulative repair rule which requires lifting the structure to FEMA base flood elevation after repair costs exceed 50% of the home value over a five-year period. R. 2099, 2846, 3019, 8146-47. Contrary to Stratton's statements in her petition, historic designation alone would not have ensured that the structure could remain in place, nor prevent its demolition as an unsafe structure. Any construction activities for repairs would still need County approval through a coastal setback variance and a building permit to ensure compliance with the Florida Building Code.

The County stayed its demolition of the seaward portion of the house pending Stratton's appeal of the condemnation order to the Sarasota County Building Code Board of Adjustments and Appeals. R. 1756. During the interim, Stratton filed preliminary paperwork for a building permit to fix the house, but never completed the necessary wind load or hydrodynamic analyses portion of the application. Tr. 1557-68.

On June 26, 2001, the County's Historic Preservation Board recommended that the Board of County

Commissioners approve historic designation for the home. R. 2847-2901. The Board of County Commissioners was scheduled to hear Stratton's application for historic designation on July 10, 2001, but continued its final decision on the matter pending the outcome of the Stratton's coastal setback variance application and her administrative appeal of the County's condemnation order to the County's Building Code Board of Adjustments and Appeals. Tr. 795; R. 2982-85; Pet. App. D, p.35.

On July 25, 2001, the Board denied Stratton's application for a coastal setback variance to make repairs to and construct a seawall for the seaward structure because it did not satisfy the variance criteria set forth in section 54-724 of the Code of Ordinances of Sarasota County, Florida. R. 2125-44, 4989. During the public hearing concerning the application, County staff provided a detailed presentation about the proximity of the seaward structure to the Gulf and the adverse environmental impact that would be caused by Stratton's proposed seawall. Pet. App. D, pp.9-10. At 6.3 feet NGVD[1] elevation, the proposed seawall would have offered only limited protection to the foundation of the seaward structure, and only under the most minor of storm events. Tr. 1205-06, 1570. Wave forces would have overtopped the seawall and crashed into the house during these

[1] NGVD stands for the National Geodetic Vertical Datum of 1929. It is a universally recognized measurement of elevation or attitude above, and depression or depth below, mean sea level.

storm events. Tr. 1205-06, 1570. Because the seaward structure was already located in an area repeatedly subject to wave action, construction of the proposed seawall would have adversely affected the neighboring parcels as a result of wave energy reflected off its surface. Tr. 1195-96.

Contrary to Stratton's contention in her petition, the proposed seawall was fundamentally different from any other coastal setback application previously received by the County. Tr. 1315-38. Stratton's proposed use of a vertical aluminum seawall to protect a home that already sits in an active tidal area is not a use granted by the County to similarly situated owners. Tr. 1315-38.

Finally, the Board's resolution denying Stratton's variance application indicated that other variances less intrusive on the public's rights and more appropriate to the long term were available, stating, "Adequate land is available to relocate the proposed residential structure as much as 27 feet further landward on the property and on a new pile foundation, or in line with other nearby development through the demolition and reconstruction of the structure further landward." R. 2366-67, 4932-36, 4958-59. The resolution also noted that its decision pertained only to the application in front of it, and specifically left open the possibility that a different variance proposal might be approved under the right circumstances by relocating or removing the seaward structure. Pet. App. D, pp.6-7. Stratton did not seek review of the validity of the Board's denial of her

coastal setback variance application in state circuit court.

On October 9, 2001, the Board of County Commissioners again continued Stratton's application for historic designation. Pet. App. D, p.36. The Board continued the matter because Stratton's administrative appeal of the condemnation order was still pending with the Building Code Board of Adjustments and Appeals. Pet. App. D, p.36.

Due to its proximity to the Gulf of Mexico and unstable condition, the house attracted visits by curiosity seekers. Tr. 1606-07. This attention triggered concerns for public safety. Tr. 1606-07. The Building Code Board of Adjustments and Appeals denied Stratton's administrative appeal of the condemnation order on November 14, 2001. Pet. App. D, p.31. Stratton subsequently sued the County in a Florida circuit court to challenge the validity of the condemnation order, Pet. App. D, p.31, but later stipulated to the dismissal of that lawsuit without prejudice.

On November 19, 2001, Stratton sent correspondence to County staff about a new variance application. R. 5556. County staff advised Stratton in December 2001 that she could not submit the exact same seawall application for Board consideration, based on the principle of administrative res judicata. Tr. 1312; R. 5559.

The Board denied Stratton's application for historic designation status for the home on December

11, 2001. Pet. App. D, p.36. Stratton subsequently sued the County in a Florida circuit court to challenge the validity of the denial of the historic designation, but later stipulated for dismissal of that lawsuit with prejudice.

In her petition, Stratton contends that the Board of County Commissioners had never before rejected the Historic Preservation Board's recommendation for historic designation. Tr. 778-819. However, as pointed out by the County's historic preservation specialist, the Board of County Commissioners is not required to follow the recommendation of the Historic Preservation Board under the Sarasota Code of Ordinances, and could have legitimately denied the application because it did not meet code criteria. Tr. 813-14. Further, historic designation did not necessarily mean that the existing use of the house at its location in the active surf would continue. Rather, the Board could have granted historic preservation status, yet conditioned approval on elevating the structure to FEMA requirements. Tr. 814.

With the assistance of County staff, Stratton applied for a Flood Mitigation Assistance grant on March 28, 2002. R. 8788, 8797. The Federal Emergency Management Agency ("FEMA") established the grant program to reduce or eliminate payouts associated with buildings and other structures otherwise insurable under the National Flood Insurance Program with a history of repetitive loss. Stratton's property had previously sustained losses on at least twelve occasions, totaling nearly $500,000 in flood

damage since 1985. R. 8822. On March 11, 2003, FEMA approved a grant of $980,000 to purchase the property, with approximately $735,000 to be paid by FEMA, and the remaining $245,000 possibly deriving from state or local sources. R. 8802.

In early March 2003, beach erosion finally led to the partial collapse of the seaward structure. Tr. 1609-11. Because of the partial collapse, the County then issued an emergency demolition order, and took immediate steps for demolition. Tr. 142, 1609-11; R. 5608-09. The demolition was completed shortly thereafter. Tr. 1313.

On April 8, 2003, Stratton appeared before the Board of County Commissioners and asked for assistance to protect the landward structure and the remainder of her property. Tr. 1312-13. The Board indicated its desire to help Stratton, encouraged her to file another application, and directed County staff to bring the matter before the Board at the earliest opportunity once the application was complete. Tr. 1313. Stratton thereafter met with County staff, but neither she nor her consultants ever submitted a new coastal setback variance application. Tr. 1314-15.

In August 2003, FEMA provided a letter outlining its acquisition offer to Stratton for purchase of her property as follows:

> Our acquisition offer acknowledges the pre-demolition Fair Market Value of the home reflected by Ms. Burns purchase price in May of 2001. The offer, prepared in December

> 2002, provides a 10% annual appreciation in real estate value for 18 months, or $920,000, together with $50,000 for demolition, and $10,000 for environmental permits, legal fees, and closing costs.

R. 8822-23. FEMA also offered to reevaluate the grant awarded "if the actual purchase price exceeded $800,000, if costs have risen, if the actual appreciation in real estate value in that neighborhood is exceeding 10% per year, or if additional months of appreciation are warranted." R. 8223. Stratton never accepted FEMA's offer. R. 8805-06. FEMA rescinded its offer on January 6, 2004. R. 8805-06.

During the summer of 2004, a number of storms (including Hurricane Ivan) passed through the Gulf, causing additional erosion. Tr. 1641-42; R. 8883. County staff inspected the landward structure on September 16 and 17, 2004, and discovered that as a result of its weak foundation, the structure was unsafe and imminent danger of collapse. Tr. 1641-1653; R. 8894, 8920. In its weakened state, the landward structure posed a threat to an adjacent home. Tr. 1612-13, 1653. The County issued an emergency condemnation order for the landward structure on September 23, 2004, and redelivered its emergency condemnation order to Stratton on September 30, 2004. Tr. 1654-55, 1661. The County subsequently demolished the landward structure on October 27, 2004. Tr. 151.

Florida Circuit Court: On June 18, 2004, Stratton sued the Board of County Commissioners of

Sarasota County. R. 1-331. The initial complaint contained the following six counts: (1) procedural due process rights violation associated with the Board's quasi-judicial hearing on Stratton's application for historic designation status; (2) substantive due process violation associated with the Board's denial of Stratton's application for a coastal setback variance; (3) equal protection violation associated with the Board's denial of Stratton's coastal setback application; (4) inverse condemnation of the property through physical invasion; (5) inverse condemnation of the property through regulation; and (6) compensation for "inordinately burdening" the property under the Bert J. Harris, Jr., Private Property Rights Protection Act, §§ 70.01 et seq., Florida Statutes. R. 1-331.

On February 23, 2005, the trial court involuntarily dismissed Count II (substantive due process). R. 782. On December 27, 2005, the Board moved for partial summary judgment as to Count I (procedural due process) and Count III (equal protection), reasoning that a person cannot simultaneously challenge the validity or propriety of a government's action while at the same time seeking inverse condemnation. R. 1214-42; *see also Key Haven Assoc. Enter., Inc. v. Board of Trustees*, 427 So.2d 153, 156 (Fla. 1983). On January 18, 2006, Stratton voluntarily dismissed with prejudice Counts I and III. R. 1321.

Stratton's third complaint, filed on January 23, 2006, contained three of the six remaining counts: (1) inverse condemnation by physical appropriation;

(2) inverse condemnation by regulation; and (3) violation of the Harris Act.[2] R. 1323-1737. Stratton further alleged that the Board, through its regulatory and police powers, caused the destruction of her home, the devaluation of her remaining land, and limited her use of the property in order to create public beach access. R. 5038-55.

The case went to trial in the Twelfth Judicial Circuit Court for Sarasota County, Florida, and took ten days to complete (April 24-28, May 30-June 2, June 9, 2006). Tr. 1-1850. Sixteen witnesses testified, many of whom were experts. Tr. 1-1850. More than 100 documents and exhibits were placed in evidence. R. 2728-6024. During the trial, Stratton conceded that both structures were unsafe at the time of their demolition by the County. Pet. App. B, p.12.

On August 11, 2006, the trial court entered a Final Judgment for Sarasota County on all of Stratton's claims. Pet. App. B, p.3. The trial court found that Stratton did not prove her inverse condemnation or Harris Act claims. Pet. App. B, p.3. The trial court also found that Stratton did not prove that the Board was motivated into its actions by any desire to take her property for beach access. Pet. App. B, p.3. Rather, the evidence demonstrated that the Board

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[2] In her petition for writ of certiorari to this Court, Stratton confuses the "inordinate burden" standard set forth in the Harris Act with the analyses used to determine whether the government has completed an inverse condemnation.

was motivated by the adverse environmental impacts of Stratton's proposed seawall, the danger of erosion to adjacent properties, the inability of the seawall to protect the home from continuing wave impact, concerns about the structural integrity of the seaward structure, and alternatives that caused less impact to coastal systems. Pet. App. B, p.10.

Next, the trial court found no categorical taking by regulation because the evidence did not establish that application of the coastal setback code deprived Stratton "all economically beneficial use" of her property. Pet. App. B, pp.11-12. The property still can support the construction of a 3,330 to 4,050 square foot single-family home. Pet. App. B, p.11. The trial court also concluded that even if no economic beneficial use existed for the property, the application of the coastal setback code was not the proximate cause of that loss. Pet. App. B, pp.11-12. The application of the code did not directly cause the continued erosion of the property and subsequent loss of use. Pet. App. B, pp.11-12.

The trial court also rejected Stratton's argument of a categorical taking through physical invasion. Pet. App. B, pp.12-13. Stratton did not follow through on any legal action challenging the validity of the demolitions and conceded that both structures were unsafe at the time of their demolition. Pet. App. B, p.12. The trial court reasoned that no taking by physical invasion occurred because the government may enter onto land to abate a public nuisance, and that the removal

of an unstable beachfront structure eliminates a public hazard to beachgoers. Pet. App. B, p.13.

Using the factors first outlined in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), the trial court conducted an *ad hoc* inquiry as to whether the County had taken the property. Pet. App. B, pp.13-22. The trial court first considered the character of the Board's action in denying the coastal setback variance, specifically, whether the Board's action went beyond the type of regulation that is a cost all citizens must pay for living in an organized society. Pet. App. B, p.14. The trial court found that the Board's application of the coastal setback code produced no disproportionate burden on Stratton. Pet. App. B, p.14. Rather, Stratton's property was uniquely compromised due to its proximity to the Gulf of Mexico, and therefore she should have expected an amplified effect from application of the code. Pet. App. B, p.14.

Continuing its *Penn Central* analysis, the trial court concluded that Stratton's investment-backed expectations concerning the value of her property were manifestly unreasonable. Pet. App. B, p.15. The trial court first reasoned that the coastal setback code had been enacted prior to Stratton's purchase of the property, and that this fact weighed heavily against Stratton's claims. Pet. App. B, pp.15-16. Next, the trial court observed that Stratton had actual knowledge of certain facts and events at the time she made her investment, including facts revealed in: (1) the Seller's Property Disclosure Statement; (2) the recorded

deed restriction; (3) the DEP permit caveat; (4) the Notice of Unsafe or Unfit Structure issued by the County; (5) the purchase contract contingency clause; (6) County staff objections to repairing the seaward structure at grade; and (7) the condemnation order for the seaward structure, which Stratton received on the same day the Historic Preservation Board recommended that the Board of County Commissioners approve historic preservation status. Pet. App. B, pp.16-19.

Citing primarily *Forest Properties, Inc. v. United States*, 39 Fed. Cl. 56 (Fed. Cl. 1997), the trial court rejected Stratton's argument that she had an objectively reasonable expectation of receiving a variance because the Board had previously granted variance approvals for construction of seawalls. Pet. App. B, pp.20-21. The trial court reasoned that prior permissive conduct by Government in its administering regulations does not affect investment-backed expectations because Government could enforce regulations in a more stringent fashion if it so chose. Pet. App. B, p.20.

Under the third factor of the *Penn Central* analysis, the trial court evaluated the economic impact of the application of the coastal setback code, and determined that due to the precarious condition of Stratton's home, it is only logical that she stood to lose more economic value than her neighbors might lose through regulation. Pet. App. B, p.21. The trial court also found that although the coastal setback code may have prevented the use of part of the property, the

property can still support a single family home. Pet. App. B, p.21. The trial court concluded that Stratton's lot remains a valuable asset as a whole. Pet. App. B, p.21.

Thus, the trial court concluded that Stratton's inverse condemnation claim failed under a theory of the doctrine of unconstitutional conditions, Pet. App. B, p.11, failed under a theory of categorical taking by regulation, Pet. App. B, pp.11-12., failed under a theory of categorical taking by physical invasion, Pet. App. B, p.13. and failed under every prong of the *ad hoc Penn Central* analysis. Pet. App. B, p.22. The trial court also concluded that Stratton did not prove an inordinate burden under the Harris Act. Pet. App. B, pp.22-24. Thus, the County prevailed on all claims.

Florida Appellate Court: On September 7, 2006, Stratton appealed the trial court's final judgment to the Second District Court of Appeal of Florida. In her initial and reply briefs, Stratton raised four issues:

> (1) Did the trial court err in concluding that the County's denial of Appellant's petition for historic designation was not the proximate cause of her loss and therefore her property was not "inordinately burdened" within the meaning of the Harris Act?
>
> (2) Did the trial court err in concluding that Appellant failed to establish a regulatory taking under the ad hoc analysis of *Penn Central Transp. Co. v. City of New York*?

(3) Did the trial court err in concluding that Appellant failed to establish a categorical taking by regulation or physical invasion?

(4) Should the trial court's final judgment be reversed because it is internally inconsistent and its findings are irreconcilable?

The Second District Court of Appeal heard oral argument on December 5, 2007, and issued a "per curiam affirmed" decision without written opinion on April 25, 2008. Pet. App. A, pp.1-2. The Second District also denied Stratton's motions for rehearing, rehearing on banc, and for certification of question to the Florida Supreme Court on June 19, 2008. Pet. App. C, p.26.

REASONS FOR DENYING THE WRIT

I. Stratton has not demonstrated a compelling reason why the writ should be issued.

Supreme Court Rule 10 states that "a petition for writ of certiorari will be granted only for compelling reasons." *Id.* Rule 10 also provides several factors the Court considers in deciding whether a compelling reason exists to issue the writ.

First, Rule 10(a) states that the Court may find a compelling reason to issue a writ as to certain decisions made by a United States court of appeals. *Id.* Here, Stratton takes issue with a decision by a Florida trial court. Thus, the instant case is unlike those envisioned by Rule 10(a).

Next, Rule 10(b) discusses those situations wherein "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." *Id.* Again, Stratton takes issue with language contained in the final judgment of a Florida trial court, and not language in a decision on an important federal question by a state court of last resort. The Second District Court of Appeal of Florida made no comment on any important federal question, but rather per curiam affirmed the trial court's final judgment without written opinion.

Finally, this case is not one which falls within the situation described in Rule 10(c) wherein "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." *Id.* Although Stratton cites *Tahoe-Sierra Preservation Council, Inc. v. Tahoe*, 216 F.3d 764, 783 n.33 (9th Cir. 2000) for the proposition that "there is little discussion of a 'causation' requirement in any of the case law involving regulatory takings," she does not actually argue in her petition that the issue of multiple causes has been left unresolved by this Court or other courts. As outlined in *Tahoe*, courts agree that a proximate cause analysis in a takings case is akin to other 42 U.S.C. § 1983 cases.

The only remaining inquiry is whether the trial court's decision in the instant case "has decided an important federal question in a way that conflicts with relevant decisions of this Court." A "federal question" is "a legal issue involving the interpretation and application of the U.S. Constitution, an act of Congress, or a treaty." BLACK'S LAW DICTIONARY 646 (8th ed. 2004). Here, the legal issue does not directly involve an interpretation and application of the U.S. Constitution, an act of Congress, or a treaty. Rather, it involves the application of the common law concept of proximate cause as it relates to a taking claim under the Fifth and Fourteenth Amendments. Thus, Stratton seeks nothing more than a reversal of what Rule 10 describes as a "misapplication of a properly stated rule of law," i.e., misapplication of the common law precedent concerning the concept of proximate cause. *Id.* Because this case cannot be characterized as one that meets the guidance criteria of Rule 10 and is otherwise unremarkable, this Court should deny issuance of the writ.

II. Stratton's petition does not identify when the federal question was raised with the state appellate court.

Supreme Court Rule 14(g)i. requires Stratton to specifically identify "the stage in the proceedings, *both in the court of first instance and in the appellate courts*, when federal questions sought to be reviewed were raised. . . ." *Id.* (Emphasis added.) Her petition did not identify when and how she raised the issue of

proximate cause as to her inverse condemnation claim with the state appellate court.

If Stratton did not present the alleged error in the proximate cause analysis as to her claim of inverse condemnation to the state appellate court, this Court will have to dismiss her case for lack of jurisdiction even if certiorari review is granted. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). "When the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Board of Directors of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987).

In the state appellate court, Stratton alleged an error in the analysis of proximate cause involving her state claim under the Harris Act, but did not allege an error in the trial court's proximate cause analysis of her inverse condemnation claim. A casual reference to an issue, in the midst of another argument, is insufficient to inform a state court that it has been presented with a federal question subject to the jurisdiction of the Court. *Id.* at n.9. Thus, this Court does not have jurisdiction to hear Stratton's case.

III. The trial court's proximate cause analysis is consistent with that used by other courts.

In every inverse condemnation case, there must be some causal connection between government conduct and the plaintiff landowner's damage. *Souza v. Silver Development Co.*, 210 Cal.App.3d 165, 171 (Cal. Ct. App. 1985). As noted in *Souza*, tort law defines proximate cause in terms of foreseeability, whereas inverse condemnation cases impose liability without regard to foreseeability. *Id.* at 171 n.3. Accordingly, a proximate cause determination in an inverse condemnation case should be thought of in terms of "substantial" causation. *Id.* at n.3. "Substantial" causation means a showing of a substantial cause-and-effect relationship between the government action and the injury that excludes the probability that other forces alone produced the injury. *Id.* at 171. A government may be liable even where one of its actions was one of several "substantial" concurring causes which contribute to a taking. *Id.*

The *Souza* court's substantial causation test is consistent with that used by the federal courts, including this Court, wherein a takings claim cannot succeed if the challenged government action caused only indirect or "consequential" injuries. *Omnia Commercial Co. v. United States*, 261 U.S. 502, 510 (1923); *Klein v. United States*, 375 F.2d 825, 829 (Ct. Cl. 1967).

Here, the trial court's approach to Stratton's takings claim was a rational one that reviewed each

regulatory action individually to determine whether there was a direct cause-and-effect relationship between the regulatory action and the alleged injury which excluded the probability that beach erosion alone produced the injury to Stratton's property. As noted by this Court, an owner of land bounded by a body of water with a dynamic shoreline gains and loses property by the actions of the water body and is not entitled to relief from the government if the land naturally erodes, because that gain or loss is an antecedent element of the property which inheres in its title. *See Banks v. Ogden*, 69 U.S. 57, 67 (1864) (holding that the owner of land bounded by the sea sustains the burdens of losses naturally imposed by the contiguity of waters). For this reason, where erosion is a natural phenomenon, a landowner does not demonstrate the necessary direct and proximate cause necessary to sustain a regulatory takings claim where the only government action is denial of a permit. *Souza*, 210 Cal.App.3d at 172; *Rains v. Washington Dept. of Fisheries,* 575 P.2d 1057, 1057 (Wash. 1978). Because the trial court's causation analysis is consistent with other court decisions involving erosion along an ephemeral shoreline, this Court should deny the petition.

IV. Stratton's petition contains several misstatements of fact that bear on the issue of proximate cause if certiorari were granted.

In her petition, Stratton erroneously argues that "by denying historic designation that had been

granted to all who had ever applied for it for all other properties, Sarasota County caused the nuisance it later claimed to abate. . . ." Pet. at 6. This is incorrect. The County condemned the seaward portion of Stratton's house as an unsafe structure in March 2001. Stratton did not apply for historic designation until May 2001. The Board did not deny the historic designation application until December 2001. Therefore, the nuisance pre-dated any action by Stratton or the Board. Stratton cannot disavow that the structure constituted a nuisance at that time because she never followed through on a lawsuit challenging the validity of the condemnation order. Further, Stratton cannot raise any equal protection arguments with this Court, because the propriety of the Board's action must be challenged separately from an inverse condemnation lawsuit, and because Stratton dismissed with prejudice her equal protection claim in the trial court.

Next, Stratton wrongly claims that the Board "precluded her from getting the automatic exemption for historic designated properties which would have allowed her to exceed the $12,000 FEMA spending cap and defend her home from further erosion." Pet. at 6. Stratton's argument suffers from the *post hoc* fallacy. Receipt of historic designation alone would not allow Stratton to defend her home from further erosion. Without a coastal setback variance and building permit, Stratton could not make any repairs or construct a seawall.

Finally, Stratton claims that a "cascading series of events created the Catch-22 that resulted in the

County later, after lengthy delay, denying Stratton a seawall permit which it had regularly granted to her neighbors because her property had eroded too much because of the County's original denial and consequent limitation to the $12,000 FEMA spending cap." Stratton does not explain what she means by a cascading series of events, or what she means by a "Catch-22" scenario.

If Stratton is suggesting that the delay in review of her historic designation application adversely influenced the Board's review of her coastal setback variance application, then that argument again suffers from the *post hoc* fallacy. As outlined in the trial court's final judgment, the Board denied Stratton's coastal setback variance application for a seawall due to the adverse environmental impacts attributable to the construction of the proposed seawall, the danger of erosion to adjacent properties, the inability of the seawall to protect the home from continuing wave impact, concerns about the structural integrity of the seaward structure, and alternatives which provided less impact to coastal systems. Therefore, it does not follow that approval of Stratton's historic designation application on July 10, 2001 necessarily would have influenced the Board's decision whether to grant or deny the coastal setback variance application on July 25, 2001.

If the Board had granted historic designation status on July 10, 2001, then the Board would simply have reviewed a variance application to build a new seawall for an *historic* structure, rather than one

without such a designation. The fact that the structure may have been recognized as historic does not factor in the Board's analysis of Stratton's seawall application under the coastal setback ordinance. Section 54-724(a) of the Code of Ordinances of Sarasota County, Florida, states:

> The Board of County Commissioners of Sarasota County after a public hearing may grant variances which would permit construction and/or excavation seaward or landward of the Gulf Beach Setback Line or waterward or landward of the Barrier Island Pass Twenty-Year Hazard Line if the Board determines that strict enforcement of the provisions of this Code would impose an unreasonable hardship on the land and such variance will not adversely affect coastal systems, nor be in substantial conflict with the attainment of the purpose of this Code. The Board shall grant only the minimum variance necessary to permit reasonable use of the property. . . .

Id. This section of the Code envisions that the Board could grant Stratton a variance for repairs to the foundation and superstructure, and construction of a seawall, only if the following occurred: (1) the prohibition on construction seaward of the GBSL would have imposed an unreasonable hardship on the land; (2) the proposed repairs and seawall would not adversely affect coastal systems; (3) the proposed repairs and seawall construction would not be in substantial conflict with the attainment of the express purpose of

the Code; and (4) the proposed repairs and seawall construction were the minimum variance necessary to permit reasonable use of the property. Nowhere in these criteria is an exception or exemption provided for historic structures.

Finally, if Stratton is suggesting that any further efforts to obtain local approval for repairs were rendered moot by the Board's denial of historic designation in December 2001, then she again has misstated the facts. At best (and assuming the Board did not condition historic designation on moving and elevating the structure), denial of historic designation only limited Stratton's options to repair the landward structure in place, instead of raising it to FEMA flood elevation. The trial court properly found that the Board's resolution denying Stratton's coastal setback variance application outlined how existing use of the property for residential purposes could be preserved, through relocating or raising the structures, or by demolishing the old structures and constructing a new structure for residential use. Any effect of the denial of the historic designation itself was either remote or simply academic. The Board's decision merely frustrated Stratton's unreasonable attempt to repair the structures in place and at grade in an active surf zone.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

NANCY A. BURNS STRATTON,

Petitioner,

vs.

BOARD OF COUNTY COMMISSIONERS
OF SARASOTA COUNTY,

Respondent.

On Petition For Writ Of Certiorari To The Florida Second District Court Of Appeal

REPLY BRIEF

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Normally, Petitioner would not file a reply, but the County misstates an undisputed fact, namely that the "county condemned the seaward portion of Stratton's house as an unsafe structure in March 2001." Brief in Opposition, p.26; see also, p.6. The home was not condemned then. Rather, only the separate utility chase on the seaward structure was condemned then, which had no effect on the main structure of the residence. (R. 2101-2102, 4349-50).

The "scour effect" referenced on p. 4 of the County's Brief in Opposition resulted from the County granting permits and variances to Stratton's neighbors to erect seawalls and revetments, which allowed them to protect their properties but exacerbated the erosion to Stratton's property. If there is an armored stretch of beach which is adjacent to an unarmored stretch, the waves and energy scour out sandy beaches such as Stratton's. In spite of the scouring affect, all seawall variance applications were approved except Stratton's. (T. 317). In fact, the dissenting Commissioner remarked that the Board had never previously denied a variance for a homeowner to protect a home at imminent risk of destruction. (T. 374).

The County suggests that Stratton's only remedy was "to move the seaward structure landward." Brief in Opposition, p.4. On October 30, 2000, Jerry Sparks, a County building official, issued a Notice of Unfit or Unsafe Structure(s) and Order to Correct. (R. 2062-71, 4335-44). It directed the Rubins (the previous owners) to either demolish the structure or obtain

a building permit to make the necessary structural repairs. If they chose to repair, they would be required to retain a licensed structural engineer to submit plans and obtain a permit. (R. 2063, 4336). Richard Hurter, a County structural engineer, recommended that a structural engineer immediately design temporary support to be placed under the edges of the exposed foundations, pending approval of a variance to build a seawall, a critical component for long term stability, which the County later refused. (R. 5572-3).

The County claims that Stratton proposed a "vertical aluminum seawall." Stratton never proposed a "vertical aluminum seawall"; rather, that was proposed by the previous owners, not Stratton. Nancy Stratton (formerly known as Nancy Burns) proposed a steel *sheet* pile wall identical to those granted to some of her neighbors to the north and to the south. (R. 4365; T. 66, 97-8, 106, 390-1).

Respectfully submitted,

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